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No. 08-852

In the Supreme Court of the United States

SARAH ILLIG AND GALE ILLIG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' claim for just compensation in connection with the preservation of a railroad right-of-way and its interim use as a recreational trail was time-barred under 28 U.S.C. 2501, because the claim was filed more than six years after the date on which the Interstate Commerce Commission issued a Notice of Interim Trail Use or Abandonment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the *Federal Reporter* but is reprinted in 274 Fed. Appx. 883. The opinion of the United States Court of Federal Claims (Pet. App. 5a-29a) is reported at 67 Fed. Cl. 47.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2008. A petition for rehearing was denied on October 1, 2008 (Pet. App. 112a-113a). The petition for a writ of certiorari was filed on December 30, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under federal law, the Surface Transportation Board (STB), the successor agency to the Interstate Commerce Commission (ICC),[1] has exclusive and plenary authority over the construction, operation, and abandonment of virtually all of the Nation's rail lines. *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 319 (1981). A rail carrier providing transportation service subject to the STB's jurisdiction may not abandon or discontinue service on any part of its railroad lines without the STB's express consent. *Id.* at 320; 49 U.S.C. 10903(a)(1).

In 1976, concerned about the loss of railroad trackage nationwide, Congress passed the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, 90 Stat. 31, in part to promote the public use, including recreational use, of rail lines that would otherwise be abandoned. See *Preseault* v. *ICC*, 494 U.S. 1, 5 (1990) (*Preseault I*). The 4-R Act authorized the ICC to delay disposition of rail lines subject to abandonment for a period of time to allow for the sale of the line for public purposes. *Id.* at 6; see 4-R Act § 809(b) and (c), 90 Stat. 145.

Congress later found that the 4-R Act had not been successful in preserving railroad rights-of-way. *Preseault I*, 494 U.S. at 5. In 1983, Congress enacted the National Trails System Act Amendments of 1983 (Trails Act), Pub. L. No. 98-11, Tit. II, 97 Stat. 42, "to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corri-

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[1] In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (49 U.S.C. 701 *et seq.*), Congress abolished the ICC and replaced it with the STB. See 49 U.S.C. 702.

dors, and to encourage energy efficient transportation use," as well as to promote the development of recreational trails. *Preseault I*, 494 U.S. at 17-18 (internal quotation marks and citations omitted); see 16 U.S.C. 1247(d). Section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d), provides an alternative to regulatory abandonment, commonly known as "railbanking." Under Section 1247(d), the STB retains jurisdiction so that the corridor may be returned to railroad use in the future, but the rail carrier transfers financial and managerial responsibility to a state or local government or qualified private organization, allowing its use in the interim as a recreational trail. See *Preseault I*, 494 U.S. at 6-7. Section 1247(d) provides that "if such interim [trail] use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. 1247(d).

A railroad corridor may be railbanked when the rail carrier files either an abandonment application under 49 U.S.C. 10903 or seeks an exemption from that provision under 49 U.S.C. 10502 (previously 49 U.S.C. 10505 (1994)). Section 10903(d) allows the STB to authorize abandonment or discontinuance if the Board finds that "the present or future public convenience and necessity require or permit the abandonment or discontinuance." Section 10502 allows the STB to exempt a rail carrier from the requirements of Section 10903 and other statutory provisions upon a showing that (1) the statutory requirement in question is "not necessary to carry out [general] transportation policy" under 49 U.S.C. 10101, and (2) the service being exempted is "of limited scope" or the statutory requirement is "not needed to protect

shippers from the abuse of market power." 49 U.S.C. 10502(a).

When a rail carrier has filed an abandonment application or request for an exemption, a party interested in acquiring or using the right-of-way for interim trail use may file a request or petition that includes: (1) a map and description of the right-of-way, or portion thereof, that the party proposes to acquire or use; (2) a statement of willingness to assume full responsibility for the right-of-way, including management, legal liability, and payment of taxes; and (3) an acknowledgment that interim trail use is subject to the "possible future reconstruction and reactivation of the right-of-way for rail service." 49 C.F.R. 1152.29(a).

In exemption proceedings, if the STB receives a complete railbanking request or petition and if the railroad agrees to negotiate, then the STB issues a Notice of Interim Trail Use or Abandonment (NITU). 49 C.F.R. 1152.29(d)(1).[2] The NITU allows the rail carrier to discontinue service and salvage the track, but delays the effective date of the abandonment of the rail line for 180 days to allow the rail carrier and the trail operator time to negotiate a railbanking and interim trail use agreement. *Ibid.* If the parties do not reach an agreement within the time allowed, then the railroad may "fully abandon the line" and terminate STB jurisdiction by filing a notice with the STB. 49 C.F.R. 1152.29(d)(1) and (e)(2). On the other hand, if the parties reach an agreement, the NITU authorizes the interim trail user to take over management of the right-of-way, subject only to the right of a rail carrier to reassert control over the

[2] In abandonment application proceedings, the STB issues a Certificate of Interim Trail Use or CITU. 49 C.F.R. 1152.29(b)(1)(ii). There is no substantive difference between a NITU and a CITU.

property to restore rail service. 49 C.F.R. 1152.29(d)(2); see *Preseault I*, 494 U.S. at 7 n.5 ("If agreement is reached, interim trail use is thereby authorized."). Once an agreement is reached, interim trail use continues until the STB vacates all or part of the NITU to (1) permit the reactivation of service, or (2) reinstate the exemption, thereby permitting full abandonment under federal law. 49 C.F.R. 1152.29(d)(2) and (3).

2. Petitioners own land in which the Missouri Pacific Railroad (MoPac) held a right-of-way for railroad purposes. Pet. App. 7a. On February 7, 1992, MoPac sought the ICC's authorization to abandon a 6.2-mile segment of rail line, portions of which pass over petitioners' land. *Ibid.*

On March 25, 1992, the ICC issued a NITU authorizing MoPac and a private trail operator to negotiate an interim trail use agreement. Pet. App. 48a-51a; see *id.* at 8a. The ICC extended the NITU until December 31, 1992. On December 30, 1992, MoPac and the trail operator finalized a trail use agreement, under which the trail operator assumed all economic and legal responsibility for maintaining the trail, and MoPac reserved a right of reentry for purposes of reactivating rail service. MoPac then executed a quitclaim deed transferring its interest in the right-of-way to the trail operator. *Id.* at 8a, 43a-44a.

In 1997, MoPac requested that the ICC reopen the proceeding and partially vacate the NITU, because MoPac needed to continue railroad operations over a .21-mile portion of the covered right-of-way. On April 18, 1997, the ICC issued a decision reopening the proceeding and vacating the NITU with respect to that segment. Pet. App. 9a.

3. a. On December 28, 1998, petitioners filed a class action complaint in the United States Court of Federal Claims (CFC), in which they alleged that their property was taken by operation of the Trails Act when it "pre-empted [their] rights to * * * property which they enjoy under state law." Compl. ¶ 16. Petitioners sought compensation for the alleged taking of their property under the Tucker Act, 28 U.S.C. 1491(a). Compl. ¶¶ 18-21; see Pet. App. 9a.

The government moved to dismiss the complaint on the ground that it was time-barred under 28 U.S.C. 2501, since it was filed more than six years after issuance of the NITU. Pet. App. 9a-10a; see 28 U.S.C. 2501 (establishing a six-year statute of limitations for claims over which the CFC has jurisdiction). The court initially denied the motion to dismiss. Pet. App. 42a-47a. The court held that the claim accrued on December 30, 1992, when MoPac finalized a trail use agreement with the trail operator, and the complaint was therefore timely. *Id.* at 46a.

In 2004, while this case was still pending, the Federal Circuit issued its decision in *Caldwell* v. *United States*, 391 F.3d 1226, cert. denied, 546 U.S. 826 (2005). In *Caldwell*, the Federal Circuit held that a Fifth Amendment takings claim under the Trails Act accrues when the STB "issues an NITU that operates to preclude abandonment under section [1247(d)]," and thereby "preclude[s] the vesting of state law reversionary interests in the right-of-way." *Id.* at 1233-1234.

After *Caldwell* was decided, the government renewed its motion to dismiss petitioners' complaint. The CFC granted the renewed motion. Pet. App. 5a-29a. The CFC held that "*Caldwell* imposes a new, blanket rule that the accrual of *any* takings claim under the Trails

Act is the issuance date of the NITU," *id.* at 19a, and that the statute of limitations therefore expired six years after the ICC issued the NITU on March 25, 1992, rendering plaintiffs' December 28, 1998 complaint untimely, *id.* at 28a-29a. The CFC further held that, because the complaint was untimely, it lacked jurisdiction. *Id.* at 22a-28a.

b. The court of appeals summarily affirmed. Pet. App. 1a-4a.

ARGUMENT

Petitioners renew their contention (Pet. 16-31) that the CFC erred in dismissing their takings claim as untimely under 28 U.S.C. 2501. The courts below correctly held that petitioners' claim was untimely because it was filed more than six years after the ICC issued a NITU, which authorized interim trail use and delayed abandonment of the railroad easement while the rail carrier and a trail operator negotiated a final interim trail use agreement. This Court has recently denied certiorari in two other cases raising the same contention. *Barclay* v. *United States*, 549 U.S. 1209 (2007); *Caldwell* v. *United States*, 546 U.S. 826 (2005). Further review in this case is likewise unwarranted.

1. a. In *Preseault* v. *ICC*, 494 U.S. 1 (1990), this Court rejected a challenge to the Trails Act on the ground that it violates the Fifth Amendment's prohibition against the taking of property without just compensation. *Id.* at 4-5. Without deciding whether the Trails Act effected a taking of property in that case, the Court held that the statute does not violate the Just Compensation Clause because it does not forbid claimants from

seeking just compensation under the Tucker Act, 28 U.S.C. 1491(a). *Preseault I*, 494 U.S. at 11-17.[3]

The petitioners in *Preseault I* subsequently filed a Tucker Act suit. By a divided vote, the en banc Federal Circuit answered the takings question this Court had declined to answer in *Preseault I*. *Preseault* v. *United States*, 100 F.3d 1525 (1996) (*Preseault II*). The plurality held that a Fifth Amendment taking occurs under the Trails Act when the Act precludes the abandonment and extinguishment of a railroad easement under state law, and thus prevents any state-law reversionary interests from vesting in a property owner. *Id.* at 1550-1551, 1552.[4]

In *Caldwell* v. *United States*, 391 F.3d 1226 (2004), cert. denied, 546 U.S. 826 (2005), the Federal Circuit held that such a claim accrues when "the railroad and trail operator communicate to the STB their intention to negotiate a trail use agreement and the agency issues an NITU that operates to preclude abandonment under [16

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[3] As petitioners note (Pet. 17-18), the *Preseault I* Court stated that the Trails Act "prevent[s] property interests from reverting under state law," 494 U.S. at 8, and suggested in dicta that "some rail-to-trail conversions will amount to takings," *id.* at 16; see also *id.* at 16 & n.9 (providing examples of applications of the Trails Act that would not amount to takings). But the Court explicitly reserved the question whether a taking had in fact occurred, *id.* at 17, and did not further address the contours of a Trails Act takings claim.

[4] As the plurality noted in *Preseault II*, it is commonly said that interest in an easement "reverts" to a property owner upon termination of the easement, although it would be more accurate to say that, when the easement is extinguished, the interest in the easement "vest[s]" in the property owner. See 100 F.3d at 1533-1534. Consistent with common usage, however, this brief refers to a property owner's retained interest following conveyance of an easement as a "reversionary" interest.

U.S.C. 1247(d)]." *Id.* at 1233. The court concluded that it is at that moment that "state law reversion interests [are] forestalled by operation of Section 8(d) of the Trails Act." *Ibid.* The court explained that, under the procedures the STB now uses to implement the Trails Act, the NITU is "the only *government* action in the railbanking process that operates to prevent abandonment" and any resulting state-law reversion of the right-of-way, since the STB plays no role in finalizing the trail use agreement. *Ibid.*

The court held in *Caldwell* that, although issuance of a NITU does not inexorably lead to interim trail use, it nevertheless marks the beginning of a federal-law preclusion of state-law reversionary rights. The court explained:

> [T]he NITU operates as a single trigger to several possible outcomes. It may, as in this case, trigger a process that results in a permanent taking in the event that a trail use agreement is reached and abandonment of the right-of-way is effectively blocked. Alternatively, negotiations may fail, and the NITU would then convert into a notice of abandonment. In these circumstances, a temporary taking may have occurred. It is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues.

391 F.3d at 1234 (citations and footnotes omitted).

b. Consistent with *Preseault II*, petitioners in this case alleged in their complaint that their property interest in a former railroad right-of-way was taken when the Trails Act prevented the vesting of the "rights to th[eir] property which they enjoy under state law." Compl. ¶ 16. The court in this case correctly concluded that peti-

tioners' claim accrued, and the statute of limitations began to run, when the ICC issued the NITU on March 25, 1992. See Pet. 3a-4a.

As the court explained in *Caldwell*, when the ICC issued the NITU, it simultaneously authorized railbanking and interim trail use, and delayed consummation of abandonment under federal law pending negotiations between the rail carrier and the trail operator. At that point, the ICC's involvement in the disposition of the railroad easement was at its end; no further approval would be required for the trail operator to commence interim trail use. Issuance of the NITU thus marked the moment at which federal law (1) at least temporarily forestalled the vesting of any state-law reversionary interests, and (2) authorized indefinite preclusion of such reversionary interests, contingent on the finalization of an interim trail use agreement. See *Caldwell*, 391 F.3d at 1233-1234.

Petitioners' claim, which was filed more than six years after Section 1247(d) first operated to preclude the reversion of their state-law interests in the former railroad right-of-way, was untimely under 28 U.S.C. 2501.

2. Although petitioners argue at length (Pet. 19-23) that the court of appeals erred in attributing any significance to the issuance of the NITU, they ultimately acknowledge that, "[i]f the easement would otherwise have been abandoned (by means other than conversion to interim trail use) before or during" the period in which the NITU is in effect, "the NITU might effect a taking for the duration of the negotiations." Pet. 27.[7] Petitioners

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[7] Petitioners do not dispute that, in this case, "the easement would otherwise have been abandoned" under state law "before or during" the

contend, however, that they are seeking compensation for a *different* taking of their property: a *permanent* taking that, in their view, commenced approximately six years before they filed their complaint in this case. Pet. 27-28. Petitioners' contention is incorrect.

As petitioners elsewhere make clear, their claim rests on the proposition that "the Trails Act effects a taking when it prevents an abandoned railroad easement from reverting under state law to the owner of the servient estate." Pet. 17.[6] To be sure, under federal

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period in which the NITU was in effect. See Pet. 27. They note, however, that in some cases, reversion does not occur under state law until after federal authorization of abandonment. But contrary to petitioners' argument, even in those cases, a NITU effectively delays state-law reversion by authorizing federal-law abandonment, but only after 180 days, and only if no interim trail use agreement is reached. See 49 C.F.R. 1152.29(c)(1) and (d)(1).

[6] To the extent petitioners contend that a Trails Act takings claim should be conceptualized not as the blocking of reversionary interests but as the subsequent physical invasion of the easement by the public, see Pet. 28 (citing *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)), that contention does not find support in this Court's cases. Although the Court in *Preseault I* reserved the question whether operation of the Trails Act necessarily results in *any* compensable taking, see 494 U.S. at 17, to the extent that it identified a potential takings question, that question concerned the blocking of reversionary interests, see *id.* at 8.

Moreover, unless the STB has already authorized abandonment under federal law, a railroad easement remains subject to the exclusive and plenary authority of the STB. Unlike the usual physical invasion case, the landowner in a Trails Act takings case is already deprived of possession and control over the property; the decision to authorize interim trail use of a railroad right-of-way, subject to later reactivation of rail use, represents a change in the set of applicable regulatory conditions, but it does not result in a new deprivation of possession and control. In any event, this case would not be an appropriate vehicle for consideration of broader questions concerning the nature and scope of

law, land subject to a railroad easement may not revert to the adjacent property owner while the easement is actually being used as a recreational trail. 16 U.S.C. 1247(d). But, as petitioners appear to recognize (Pet. 27), by the time a trail use agreement is signed, federal law has *already* forestalled any such reversion. As the Federal Circuit has explained, a NITU stands as a "barrier to reversion" so long as it is in effect. *Barclay* v. *United States*, 443 F.3d 1368, 1374 (2006), cert. denied, 549 U.S. 1209 (2007).

Petitioners contend that any taking that commences upon issuance of the NITU is "temporary at the outset," and that their takings claim should not accrue until the taking is "transformed into a permanent interference." Pet. 31 n.4. The court of appeals has correctly rejected that contention. See *Caldwell*, 391 F.3d at 1235. As the court explained, under the current regulations implementing the Trails Act, "issuance of the NITU is the only *government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way." *Id.* at 1233-1234. To the extent the government's action results in a taking of property, it is a "single taking," *id.* at 1235, of a "single reversionary interest," *Barclay*, 443 F.3d at 1378.

The issuance of the NITU thus "marks the 'finite start' to either temporary or permanent takings claims." *Caldwell*, 391 F.3d at 1235. When the NITU is issued, all the events have occurred that entitle the claimant to institute an action based on federal-law interference

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Fifth Amendment liability under the Trails Act. The course of litigation in this case has narrowed the issues to the question when the statute of limitations begins to run on a claim that the Trails Act has blocked the vesting of state-law property interests. See Pet. App. 1a-4a; cf. Pet. i.

with reversionary interests, and any takings claim premised on such interference therefore accrues on that date. *John R. Sand & Gravel Co.* v. *United States*, 457 F.3d 1345, 1355-1356 (Fed. Cir. 2006), aff'd, 128 S. Ct. 750 (2008) (internal quotation marks and citations omitted). The fact that any taking resulting from the interference may later prove to have been temporary is irrelevant; as the court of appeals has explained, "[i]t is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues." *Caldwell*, 391 F.3d at 1234.

Finally, accepting the proposition that the NITU marks the "finite start" of their claim based on the preclusion of reversionary interests, petitioners contend that the preclusion does not "stabilize[ ]," and the claim thus does not accrue, until the rail carrier and the trail operator enter into a trail use agreement. Pet. 31. Petitioners rely for that contention on *United States* v. *Dickinson*, 331 U.S. 745 (1947), in which the Court held that the statute of limitations did not bar a claim for a taking of property by gradual flooding "when it was uncertain at what stage in the flooding operation the land had become appropriated to public use." *United States* v. *Dow*, 357 U.S. 17, 27 (1958). In this case, however, petitioners do not dispute that the preclusion of reversionary interests on which their takings claim rests occurred immediately upon issuance of the NITU, rather than gradually, as in *Dickinson*. That it may not have been clear at the outset whether the preclusion was indefinite or merely temporary does not change the fact that the NITU marked the "finite start" to the preclusion. *Caldwell*, 391 F.3d at 1235.

3. Petitioners (Pet. 32) contend that this Court's review is warranted to resolve a conflict with *National*

Ass'n of Reversionary Property Owners v. *Surface Transportation Board*, 158 F.3d 135 (D.C. Cir. 1998), in which the court stated that "[b]ut for the negotiation of a trail use agreement, state property law would be revived and, possibly, trigger the extinguishment of rights-of-way and the vesting of reversionary interests." *Id.* at 139. As petitioners themselves note (Pet. 32), *National Ass'n of Reversionary Property Owners* concerned a challenge to the denial of a request for rulemaking; the accrual date of a takings claim was not at issue. In any event, the District of Columbia Circuit's statement is not inconsistent with *Caldwell*, which held that a "permanent taking" may be consummated once "a trail use agreement is reached and abandonment of the right-of-way is effectively blocked," 391 F.3d at 1234 (citing *Preseault II*, 100 F.3d at 1552), but emphasized that issuance of the NITU is the event that "trigger[s that] process," *ibid.*

Petitioners also err in contending (Pet. 32-33) that the *Caldwell* rule conflicts with earlier decisions of the Federal Circuit. As the *Caldwell* court itself noted, no earlier Federal Circuit decision had ever addressed the question when a Trails Act takings claim accrues. 391 F.3d at 1228 ("This case requires us, for the first time, to determine when the Fifth Amendment takings claim accrues for purposes of the six-year statute of limitations under the Tucker Act.") (citations omitted). The Federal Circuit has consistently adhered to *Caldwell*'s conclusion that a takings claim under *Preseault II* accrues when the NITU is issued. See *Barclay*, *supra*; Pet. App. 1a-4a.[7]

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[7] Petitioners rely (Pet. 32-33) on language in *Preseault II* and other Federal Circuit opinions suggesting that "the establishment of the rec-

In any event, even if there were an intra-circuit conflict between later and earlier cases on this issue, it would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Petitioners claim that any intra-circuit conflict in this area is "uniquely important" because the Federal Circuit has "exclusive appellate jurisdiction over takings claims against the federal government." Pet. 33 n.5. But as *Caldwell* and Federal Circuit cases following it (including this case) make clear, the Federal Circuit now consistently applies the *Caldwell* rule. There thus is now clear precedent for trial courts to follow in Trails Act cases under the Tucker Act, and landowners have a clear and simple rule for determining when a just compensation claim accrues.

4. Finally, petitioners err in suggesting (Pet. 35-37) that the decision below has important practical consequences that warrant this Court's intervention.

Although petitioners repeatedly criticize (Pet. 19, 35) the court of appeals for adopting a "one-size-fits-all 'bright-line rule,'" that bright-line rule has the singular virtue of providing certainty to prospective claimants of when their claims accrue and when the limitations period expires. See *Barclay*, 443 F.3d at 1378. Notably,

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reational trail" results in a taking of property under the Fifth Amendment. *Presault II*, 100 F.3d at 1531 (plurality opinion); see also *Hash* v. *United States*, 403 F.3d 1308, 1318 (Fed. Cir. 2005); *Toews* v. *United States*, 376 F.3d 1371, 1381 (Fed. Cir. 2004). *Presault II*, however, held that a taking occurred when the Trails Act operated to prevent a property owner's interests in a railroad right-of-way from reverting to the owner in accordance with state law. 100 F.3d at 1550-1551, 1552; see *Caldwell*, 391 F.3d at 1233. The court in *Presault II* had no occasion to consider whether the preclusion of reversionary interests occurred simultaneously with "the establishment of the recreational trail," or upon issuance of a NITU.

the government is not aware of any currently pending case that is subject to dismissal under *Caldwell*.[8]

Petitioners also err (Pet. 36) in predicting that the *Caldwell* rule will lead to a proliferation of unnecessary litigation. In this case, the difference between the accrual date identified by the court of appeals and the accrual date petitioners urge is a matter of months; and in most cases, the difference between the two dates will not meaningfully alter property owners' litigation incentives. It is true that, under *Caldwell*, landowners may seek compensation for an alleged taking immediately upon issuance of the NITU, even though no trail use agreement is reached, and any taking that may later be found would only have been temporary. But a landowner has six years within which to file suit, which is ample time for the landowner to know whether an agreement was reached before filing suit. Moreover, the prospect of the litigation petitioners hypothesize is hardly unique to the Trails Act context. See *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 334-335 (2002). And this Court has made clear that such allegations "require[] careful examination and weighing of all of the relevant circumstances," *id.* at 335 (internal quotation marks and citation omitted), with due regard for the principle that not "every delay in the use of prop-

[8] The government is, however, aware of one case pending in the Federal Circuit in which the *Caldwell* rule is otherwise relevant. In *Fauvergue* v. *United States*, No. 2009-5048 (filed Feb. 26, 2009), the Federal Circuit is considering the question whether putative class members are allowed to opt in after the six-year statute of limitations has expired, when the class action complaint was filed before the expiration as to one plaintiff and was amended after expiration of the limitations period to add other plaintiffs as putative class members. A similar question is presented in other cases now pending before the United States Court of Federal Claims.

erty" will require compensation, *ibid.*; cf. *Caldwell*, 391 F.3d at 1234 n.7 (reserving the question whether "the issuance of the NITU in fact involves a compensable temporary taking when no agreement is reached").

Finally, there is no merit to petitioners' suggestion (Pet. 35) that the decision below raises justiciability questions that warrant further review. Petitioners acknowledge that a claim becomes ripe, and that a landowner has standing, when Section 1247(d) has "interfere[d] with the abandonment and reversion that would otherwise occur under state law." Pet. 35. For the reasons explained above, see pp. 8-10, *supra*, that interference begins on the date when the STB issues a NITU, which "halt[s] abandonment and the vesting of state law reversionary interests when issued." *Caldwell*, 391 F.3d at 1235. This Court has twice before denied review of that conclusion, in *Caldwell* and *Barclay*, and there is no reason for a different result in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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